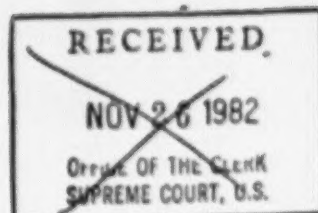


NO. 82-5789



IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

ROBYN LEROY PARKS,

Petitioner,

-v-

STATE OF OKLAHOMA,

Respondent.

WRIT OF CERTIORARI TO
THE OKLAHOMA COURT OF CRIMINAL APPEALS
PETITION FOR WRIT OF CERTIORARI

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I.
QUESTIONS PRESENTED

1. Can a state appellate court circumvent the constitutional mandate that a capital jury be given an option of convicting a defendant on a lesser included offense where the evidence supports such a finding by requiring that the corpus delicti of the lesser crime be proved independent of a statement admitted into evidence of the lesser included crime.

2. Can a state appellate court consistent with the Eighth and Fourteenth Amendments to the United States Constitution limit a jury's consideration of mitigating circumstance by approving a jury instruction which precludes the jury from considering sympathy, sentiment, passion or prejudice or any other arbitrary factor in determining punishment?

3. Is it consistent with the Eighth and Fourteenth Amendments to the United States Constitution to instruct the jury they may consider any and all factors including non-statutory aggravating circumstances in determining punishment?

4. Can a state appellate court consistent with the Eighth and Fourteenth Amendments to the United States Constitution limit the scope of appellate review of capital cases by merely concluding that a particular death sentence was not disproportionate and was similar to other cases when evidence conclusively demonstrates that 90% of all capital cases in the State of Oklahoma require a finding of the aggravating circumstance cruel, heinous or atrocious or probability of future acts of violence which would constitute a continuing threat to society and wherein this sole aggravating circumstance was not the basis for the death sentence in any other capital case in the state?

5. Can a state appellate court consistent with the Eighth and Fourteenth Amendments to the United States Constitution interpret their capital punishment statute as mandatory unless mitigating circumstances outweigh aggravating circumstances and does such interpretation unconstitutionally shift the burden of proof to petitioner to prove he should be given a sentence of life?

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NO.

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PETITION FOR WRIT OF CERTIORARI TO
THE OKLAHOMA COURT OF CRIMINAL APPEALS

The Petitioner, ROBYN LEROY PARKS, requests that a Writ of Certiorari issue to review the judgment of the Oklahoma Court of Criminal Appeals entered in this case on August 26, 1982.

OPINION BELOW

The opinion of the Oklahoma Court of Criminal Appeals was published and appears at 651 P.2d 686 (Okla. Cr. 1982). It appears in Appendix A to this petition. No opinions were rendered by the trial court.

JURISDICTION

The petitioner is seeking a Writ of Certiorari to the Oklahoma Court of Criminal Appeals in order to review a judgment entered on August 26, 1982. A timely Petition for Rehearing (Appendix B), was denied by the Court of Criminal Appeals on September 28, 1982. (Appendix C) Jurisdiction is invoked under 28 U.S.C. §1257(3), petitioner having asserted below and asserting herein deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED IN THIS CASE

2. The United States Constitution, Amendment VIII provides:

"Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishments inflicted."

3. The United States Constitution, Article XIV provides, in pertinent portion:

"...Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any persons within its jurisdiction the equal protection of the laws."

4. 21 O.S. §701.7 (1976) provides, in pertinent portion:

Murder in the First Degree

A. "A person commits murder in the first degree when he unlawfully and with malice aforethought causes the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof."

5. 21 O.S. §701.8 (1976) provides, in pertinent portion:

Murder in the Second Degree

"Homicide is murder in the second degree in the following cases: (2) when perpetrated by a person engaged in the commission of any felony other than the unlawful acts set out in §1 sub section (b), of this act."

6. 21 O.S. §701.9 provide:

Punishment for Murder

A. "A person who is convicted of or pleads guilty or nolo contendere to murder in the first degree shall be punished by death or by imprisonment for life."

B. "A person who is convicted of or pleads guilty or nolo contendere to murder in the second degree shall be punished by imprisonment in a state penal institution for not less than ten (10) years nor more than life."

7. 21 O.S. §701.10 provides:

Sentencing proceeding - Murder in the First Degree.

"Upon conviction or adjudication of guilt of a defendant of Murder in the First Degree, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be

sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practical without presentence investigation. If the trial jury has been waived by the defendant and the state or if the defendant pleaded guilty or nolo contendere, the sentencing proceeding shall be conducted before the court. In a sentencing proceeding evidence may be presented as to any mitigating circumstances or as to any of the aggravating circumstances enumerated in this act. Only such evidence in aggravation as the State has made known to the defendant prior to trial shall be admissible. However this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of United States or the State of Oklahoma. The State, the defendant or his counsel shall be permitted to present argument for or against sentence of death."

8. 21 O.S. §701.11 provides:

Instructions-jury findings of aggravating circumstance.

"In the sentencing proceeding, the statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury, if its verdict be a unanimous recommendation of death, shall designate in writing signed by the foreman of the jury the statutory aggravating circumstance or circumstances which, it unanimous found beyond a reasonable doubt. In non-jury cases, the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this act is so found or if it is found, that any such aggravating circumstances outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life."

9. 21 O.S. §701.12 provides, in pertinent portion:

Aggravating Circumstances

"Aggravating circumstances shall be ...

(4) the murder was especially heinous, atrocious or cruel; (5) the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution...(7) the existence of a probability the defendant would commit criminal acts of violence that would constitute a continuing threat to society;..."

10. 21 O.S. §701.13 provides:

Death Penalty-Review of Sentence

"Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Oklahoma Court of Criminal Appeals. The clerk of the trial court, within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the Oklahoma Court of Criminal Appeals together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be on a form of a standard questionnaire prepared and supplied by the Oklahoma Court of Criminal Appeals.

B. The Oklahoma Court of Criminal Appeals shall consider the punishment as well as any errors enumerated by way of appeal.

C. With regard to the sentence, the court shall determine: (1) whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factors; (2) whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in this act; and (3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

D. Both the defendant and the State shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

E. The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors the court with regard to review of death sentences, shall be authorized to: (1) affirm the sentence of death; or (2) set the sentence aside and to remand the case for modification of the sentence to imprisonment for life.

F. The sentence review shall be in addition to direct appeal, if taken and the review on appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence."

11. 21 O.S. §1550.22(a) provides:

Taking credit or debit card--Receiving
taken credit or debit card.

"A person who takes a credit card or debit card from the person, possession, custody or control of another without the cardholder's consent, or who, with knowledge that it has been so taken, receives the credit card or debit card with intent to use it or to sell it, or to transfer it to a person other than the issuer or the cardholder, is guilty of card theft and is subject to the penalties set forth in Section 1550.33(a) of this title."

STATEMENT OF THE CASE

The petitioner was charged in an Oklahoma state trial court with the crime of Murder in the First Degree, 21 O.S. §701.7 (1976) Supp. in connection with the homicide of Abdullah Ibrahim. R 1*

The evidence adduced at petitioner's trial showed the victim was found shot to death on the floor of a Gulf Service Station where he was employed. An unused charge slip bearing various notations on both the front and back, which was apparently used as a scratchpad to compute the customer's purchases and figure tax, was found at the scene of the homicide by an investigating police officer. This same charge slip also had a license tag number written across the front of it, XZ-5710. It was subsequently determined that the owner of the vehicle bearing that license tag number was petitioner. Approximately two weeks thereafter an informant, James Clegg, testified that he had allowed the police representatives to tape two conversations that he had with petitioner who was then in San Pedro, California. During the course of the August 29th telephone conversation, petitioner allegedly told Clegg that he shot the victim because the victim had written down his tag number and petitioner was afraid the victim would call the police when he realized petitioner's credit card was hot.

At the conclusion of the trial, the trial judge instructed on the crime of Murder in the First Degree pursuant to 21 O.S. §701.7. The court refused petitioner's requested instruction on Murder in the Second Degree, 21 O.S. §701.8 on the grounds that there was insufficient evidence of use of a bogus credit card. (Tr p. 543).

*The record in the Oklahoma Court of Criminal Appeals consists of a bound record consisting of the instruments filed in the trial court including the jury instructions (hereafter referred to as R.) and a trial transcript (hereafter referred to as Tr.)

Despite this ruling by the trial court, the argument of the prosecutor to the jury was directed to the fact the purpose of the murder was because the defendant was using a fraudulent credit card. (Tr p. 621-623).

After the jury convicted petitioner of First Degree Murder, a separate sentencing hearing pursuant to 21 O.S. §701.10 was had in the presence of the jury. The jury was instructed that "In arriving at your determination of punishment, you must first determine whether at the time the murder was committed any one or more of the following statutory aggravating circumstances existed beyond a reasonable doubt:

(1) the murder was especially heinous, atrocious or cruel; (2) the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution; (3) the existence or probability the defendant would commit criminal acts of violence that would constitute a continuing threat to society...(R 32).

The court further guided the jury's assessment of the aggravating circumstance cruel, heinous and atrocious by defining these terms. (R 33). No guiding instruction was given regarding probability of future acts of violence which would constitute a continuing threat to society or the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution. The court then instructed the jury on a list of minimum mitigating circumstances and told the jury that what facts or evidence may constitute additional mitigating circumstances was for the jury to determine. (R 34). The court then instructed:

"In the event you find unanimously that one or more of these aggravating circumstances existed beyond a reasonable doubt, then you would be authorized to consider imposing a sentence of death.

If you do not find unanimously beyond a reasonable doubt one or more of the statutory aggravating circumstances existed, then you would not be authorized to consider the penalty of death, and the sentence would be imprisonment for life.

Even if you find unanimously one or more of the aggravating circumstances existed beyond a reasonable doubt, and if you further find that such aggravating circumstance or circumstances is outweighed by the finding of one or more mitigating circumstance, then in such event the death penalty shall not be imposed, and the sentence would be imprisonment for life. " (R 35).

The court further told the jury in Instruction No. 9 that:

"In arriving at your determination as to what sentence is appropriate under the law, you are authorized to consider all the facts and circumstances of this case whether presented by the State or the defendant and whether presented in the first proceeding or this sentencing proceeding...

You are the judges of the facts. The importance and worth of the evidence is for you to determine. You must avoid any influence of sympathy, sentiment, passion, prejudice, or other arbitrary factor when imposing sentence. You should discharge your duties as jurors impartially, conscientiously and faithfully under your oaths and return such verdicts as the evidence warrants when measured by these instructions." (R 38).

The jury returned with a verdict sentencing the defendant to be put to death after finding that the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution but failing to find the murder was especially heinous, atrocious or cruel or the existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. Pursuant to that verdict, the trial court sentenced the defendant to be put to death.

On appeal to the Oklahoma Court of Criminal Appeals, the petitioner contended that the denial of a lesser included offense instruction violated this Court's rule of law in Beck v. Alabama, 447 U.S. 625 (1980). The Court of Criminal Appeals in its decision, created an exception to the Beck requirement by stating the sole basis for the giving of a second degree

instruction would have been the statements of petitioner during his tape recorded conversation with a police informant. The court concluded that since the corpus delicti of the crime of Second Degree Murder had not been established independent of the statement, this Court's requirement in Beck that a jury be permitted to consider a verdict of guilt of a lesser included offense in a capital case as is constitutionally mandated, was not violated.

Petitioner also contended in his initial appeal to the Oklahoma Court of Criminal Appeals that the jury was limited in its consideration of mitigating circumstances in violation of Lockett v. Ohio, 438 U.S. 586 (1978) by virtue of the jury instruction which read:

"You must avoid any influence or sympathy, sentiment, passion, prejudice or other arbitrary factor when imposing sentence."

The court held that this statement did not nullify mitigating circumstances because it was taken out of context and was found in a general instruction on the duty of the juror and that the jurors were properly instructed in a previous instruction, that they were not limited in their consideration to minimum mitigating circumstances but could consider any other mitigating circumstance they found existed from the evidence.

It was also contended by the petitioner on his direct appeal to the Oklahoma Court of Criminal Appeals that a jury instruction authorizing the jury to consider all evidence presented throughout the trial in determining what sentence the defendant should receive, violated a plurality of this Court in Gregg v. Georgia, 428 U.S. 153 (1976 opinion of Stewart, J., Powell, J. and Stevens, J. in that it failed to guarantee that the discretion afforded the sentencing body on a manner involving capital punishment must be suitably directed and limited as to minimize the risk of arbitrary and capricious action. Petitioner contended that this jury instruction

allowed the jury to consider and rely on in reaching its death verdict non-statutory aggravating circumstances which the subsequent appellant court would be unaware of and allowed the jury total and unbridled discretion to give a life sentence or a death penalty without meaningful guidelines in violation of the United States Supreme Court mandate in Gardner v. Florida, 430 U.S. 349.

"It is of vital importance to the defendant and to the community that any decision to impose the death sentence be and appear to be, based on reason rather than caprice or emotion."

The petitioner also contended on his direct appeal to the Oklahoma Court of Criminal Appeals that the jury's sentencing decision was arbitrary and capricious and that the sole aggravating circumstance that the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution was not proven beyond a reasonable doubt. Petitioner contended that this Court's opinion in Godfrey v. Georgia, 446 U.S. 420 (1980) was violated by the application of this aggravating circumstance to the facts of the case. The petitioner contended that since the trial court held as a matter of law there is insufficient evidence to show that the murder resulted by the defendant attempting to escape from the commission of a felony, to-wit: the use of a false and bogus credit card, that a jury could not then come about and find the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution. The defendant argued that since the Murder in the Second Degree instruction was denied by the trial judge, obviously there was not sufficient evidence to go to the jury on this issue and the court should have stricken the aggravating circumstance because it allowed the sentencing jury to base an opinion and give the death sentence arbitrarily and capriciously in light of this being the only aggravating circumstance found by the jury. The petitioner's argument was

brushed aside by the Oklahoma Court of Criminal Appeals in a one paragraph answer stating the argument was wholly without merit by virtue of this Court's clear mandate in Lockett v. Ohio, 438 U.S. 586 (1978) which authorizes the sentencer, in this case the jury, to consider not only the defendant's record and character, but any circumstances of the offense.

Petitioner finally argued on his brief to the Oklahoma Court of Criminal Appeals that the Court of Criminal Appeals' decision in Irvin v. State, 617 P.2d 588 (Okla. Cr. 1980) created an unconstitutional mandatory imposition of death penalty once aggravating circumstances outweighed mitigating circumstances. The court in Irvin held:

"The only discretion provided the jury under the statute is that necessary to make a factual finding of the existence or non-existence of aggravating and mitigating circumstances, as well as the discretion requisite in balancing the two."

The petitioner pointed out to the court that the trial court had failed to instruct the jury as to what would happen if mitigating circumstances did not outweigh aggravating circumstances and the obvious inference of the jury instruction on burden of proof is that if the aggravating circumstances were not outweighed by the mitigating circumstances, death was mandatory. The Oklahoma Court of Criminal Appeals brushed aside this argument by not addressing it. Rather, the court concluded that the Oklahoma statute provides objective standards to guide the jury in its sentencing decision; the jury is not required to recommend death even if it finds that one or more aggravating circumstances have been established beyond a reasonable doubt. Similar statutory schemes have been upheld by the Supreme Court in Gregg v. Georgia, 428 U.S. 153 and Proffitt v. Florida, 428 U.S. 242 (1976). The court failed to address the issue of why the death penalty was not mandatory if aggravating circumstances were outweighed by mitigating circumstances. This issue is in direct conflict with this

Court's decision in Woodson v. North Carolina, 428 U.S. 280 (1976) [Plurality Opinion].

Similarly, the Oklahoma Court of Criminal Appeals held that 21 O.S. 1976 Supp. §701.11 did not unconstitutionally shift the burden of proof to the appellant to prove sufficient mitigating circumstances to outweigh aggravating circumstances. The court stated that since the judge instructed in the second stage of the trial that the state was required to prove beyond a reasonable doubt at least one aggravating circumstance, that the fact that the burden of proof shifted to the defendant as to mitigating circumstances did not conflict with this Court's opinion in Mullaney v. Wilbur, 421 U.S. 684 (1975).

Unlike the statutory schemes approved by this Court in Gregg v. Georgia, 428 U.S. 153 (1976), Proffitt v. Florida, 428 U.S. 242, and Jurek v. Texas, 428 U.S. 262. The Oklahoma capital punishment statute as interpreted by the Oklahoma Court of Criminal Appeals does not allow the jury to choose once aggravating evidence is shown beyond a reasonable doubt to exist whether to impose the death penalty but mandatorily requires the jury to give the death penalty unless said circumstance is outweighed by mitigating circumstances. This interpretation amounts to a mandatory death penalty and is a mere papering over of the unguided jury discretion condemned by several members of this Court in Furman v. Georgia, 408 U.S. 238 (1972). Similarly, if the interpretation of the Oklahoma Court of Criminal Appeals is not in conflict with the Eighth and Fourteenth Amendments to the United States Constitution and mandatory death is permissible under this situation, surely said interpretation shifts the burden of proof to the petitioner in violation of Mullaney v. Wilbur. The particular interpretation of the Oklahoma Court of Criminal Appeals placed on the Oklahoma death penalty statute has a direct effect on approximately forty people currently on death row in the State of Oklahoma and may have a similar effect on other states who

--
may choose to follow the Oklahoma Court of Criminal Appeals' interpretation of a facially proper death penalty statute.

HOW THE FEDERAL QUESTIONS WERE
RAISED AND DECIDED BELOW

1. The petitioner through counsel, requested a Murder in the Second Degree instruction before the trial court. This instruction was denied by the trial court. Counsel for the petitioner took exception to the denial but did not specify that the Eighth and Fourteenth Amendments to the United States Constitution guaranteed him a right to this jury instruction. It should be noted that petitioner's trial was held approximately two years prior to this court's holding in Beck v. Alabama, 447 U.S. 625 (1980). It is believed that the decision in O'Connor v. Ohio, 385 U.S. 92 (1966), would excuse the failure to raise the question in the trial court under these circumstances.

On appeal to the Oklahoma Court of Criminal Appeals, this issue was presented in petitioner's original brief and this court's opinion in Beck was cited and argued as the basis of the error of the trial court.

The opinion in the Court of Criminal Appeals addresses the Beck issue on its merits and no comment was made nor any alleged by the State of failure by petitioner to raise this issue in the trial court.

2. No objection to the instruction limiting the jury's right to consider sympathy, sentiment or prejudice or other arbitrary factors was made at trial. This argument was raised on appeal and addressed on the merits by the Oklahoma Court of Criminal Appeals. The court, while holding that some other errors were waived by counsel's failure to object, issued an opinion on the merits as to this issue.

3. The petitioner did not object at trial to the jury instruction which told the jury they could consider all evidence introduced in the first and second stage of the proceedings in determining what punishment was appropriate. This argument was raised on appeal and argued to the Court of

Criminal Appeals that non-statutory aggravating circumstances were considered by the jury in reaching a death verdict, especially in light of the finding of only one aggravating circumstance by the jury. The Court of Criminal Appeals addressed this issue on the merits and the State did not allege that this error was waived by the failure to object by petitioner's attorney. Further this issue was raised again on rehearing in light of the statistical survey showing the Oklahoma Court of Criminal Appeals that this case was the only case out of approximately forty-five cases wherein this sole aggravating circumstance found by the jury resulted in a death penalty verdict. Rehearing was denied without opinion on this statistical argument advanced for the first time on petitioner's rehearing petition.

4. This issue arises for the first time on appeal by virtue of the Oklahoma Court of Criminal Appeals' holding that this aggravating circumstance was supported by sufficient evidence. Counsel for petitioner initially offered a murder in the second degree instruction which was rejected by the trial court. The court's decision stating that the evidence supported this statutory aggravating circumstance was addressed on the merits by the Court of Criminal Appeals.

This issue results from an appellate interpretation of the Oklahoma Capital Punishment statute which is clearly at odds with the plurality opinion of Justices Stewart, Powell and Stevens in Gregg, supra. It was raised for the first time on appeal after the Oklahoma Court of Criminal Appeals came down with its decision in Irvin v. State, 617 P.2d 588 (Okla. Cr. 1980) and was addressed on the merits by the Oklahoma Court of Criminal Appeals.

REASONS FOR GRANTING THE WRIT

In upholding the conviction of the petitioner, the Oklahoma Court of Criminal Appeals disposed of federal constitutional questions in a way which fundamentally misconstrues previous decisions of this court. The Oklahoma Court of Criminal Appeals has similarly created new exceptions to the requirements placed on capital sentencing announced by this court in Gregg v. Georgia, 428 U.S. 153 (1976) [Opinion of Stewart, J., Powell, J. and Stevens, J.]; Woodson v. North Carolina, 428 U.S. 280 (1976), Gardner v. Florida, 430 U.S. 349 (1977) and Eddings v. Oklahoma, 453 U.S. ____ 102 S.Ct. 869 (1982), (O'Connor J. concurring) and Beck v. Alabama, 447 U.S. 625 (1980). The interpretation placed on their facially constitutional capital sentencing statute by the Oklahoma Court of Criminal Appeals creates serious problems concerning capital sentences and trials of capital cases in the State of Oklahoma.

I.

THIS COURT SHOULD GRANT CERTIORARI TO PREVENT THE OKLAHOMA COURT OF CRIMINAL APPEALS FROM CIRCUMVENTING THE CONSTITUTIONALLY MANDATED REQUIREMENT THAT A JURY BE GIVEN AN OPTION OF CONVICTING A DEFENDANT ON A LESSER INCLUDED OFFENSE WHERE EVIDENCE SUPPORTS SUCH A FINDING.

In Beck v. Alabama, 447 U.S. 625 (1980), this Court held that a jury must be given an option of convicting a defendant of a lesser included offense in a capital trial where the evidence supports it as a matter of federal constitutional law under the Eighth and Fourteenth Amendments to the United States Constitution. The Oklahoma Court of Criminal Appeals attempts to circumvent this constitutional mandate created by this court in Beck by stating there was insufficient evidence of a corpus delicti of the crime independent of the statement of the defendant and that while the defendant's statement was

admissible in the trial of the matter, said evidence could not go toward an instruction on murder in the second degree. Petitioner contends that the same factors underlying this Court's holding in Beck apply with equal force to this Oklahoma created exception to Beck.

II.

THIS COURT SHOULD GRANT CERTIORARI TO PREVENT THE OKLAHOMA COURT OF CRIMINAL APPEALS FROM CONTINUING TO APPROVE JURY INSTRUCTIONS WHICH LIMIT MITIGATING CIRCUMSTANCES.

Lockett v. Ohio, 438 U.S. 586 (1978) allows for the sentencer in all but the rarest kinds of capital cases be allowed to consider anything in mitigation of punishment. Petitioner in the instant case contended on direct appeal that the preclusion of the jury from considering sympathy, sentiment, passion or prejudice or any arbitrary factor in reaching their decision on life and death restricted mitigation in violation of Lockett. Despite the obvious problem, the Oklahoma Court of Criminal Appeals has had with limiting mitigating circumstances (See generally Eddings v. Oklahoma, 453 U.S. ____ 102 S.Ct. 869 (1982) the court held that this jury instruction did not nullify the court's earlier instruction concerning mitigation. Webster's New World Dictionary, Second College Edition defines sympathy as being and entering into or the ability to enter into, another person's mental state, feelings, emotions, pity or compassion felt for another's troubles or sufferings. Not allowing the jury to consider these factors in determining whether one deserves life or death is a substantial denial of a federal constitutional right.

III.

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER THE OKLAHOMA COURT OF CRIMINAL APPEALS' DECISION APPROVING A JURY INSTRUCTION WHICH ALLOWS THE JURY TO CONSIDER NON-STATUTORY AGGRAVATING CIRCUMSTANCES IN DETERMINING LIFE OR DEATH.

The Oklahoma Court of Criminal Appeals in approving a jury instruction authorizing the jury to consider all evidence both at the first and second stages of the trial in determining the appropriate punishment and not limiting the instruction to a consideration of the evidence which goes to statutory aggravating circumstances or mitigating circumstances allowed the jury to consider any factor it so chose in determining life or death. This court has currently granted certiorari in Barclay v. Florida, 81-6908. One of the issues raised in the Barclay petition was the use of non statutory aggravating circumstances in justifying a death penalty verdict. While in petitioner's case the sentencer, the jury under Oklahoma law, did not specify what circumstances it relied on in rendering the death penalty outside of the statutory aggravating circumstances. It was instructed that it could consider any factor it so chose in arriving at its verdict in the case. Petitioner also points out that the Oklahoma Court of Criminal Appeals in denying this claim construes this Court's opinion in Lockett v. Ohio, supra, to allow all evidence received in a trial admissible for determining a death penalty verdict. This action circumvents the plurality opinion of Justices Stewart, Powell and Stevens in Gregg v. Georgia, 428 U.S. 153 requiring that the death penalty be imposed in a way that minimizes the risk of arbitrary and capricious action. See also Eddings v. Oklahoma, supra. (O'Connor J. concurring).

IV.

THIS COURT SHOULD GRANT CERTIORARI TO
STOP STATE APPELLATE COURTS FROM RUBBER
STAMPING FINDINGS OF AGGRAVATING
CIRCUMSTANCES IN CAPITAL CASES.

The jury in the instant case was instructed that they had to find one aggravating circumstance before they were authorized to consider the death penalty. Though the jury failed to find the defendant had a probability of future acts of violence which would constitute a continuing threat to society or the offense was cruel, heinous and atrocious, it sentenced petitioner to death on a finding that the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution. The Oklahoma Court of Criminal Appeals approved this finding while in the same breath, holding they were not constitutionally required to furnish petitioner with a jury instruction that stated the murder existed while the petitioner was in the commission of the use of a stolen credit card, a lesser included offense under the laws of the State of Oklahoma. 21 O.S. §701.8.

The rubber stamping of this aggravating circumstance demonstrates the inadequacy of the appeal review of death sentences by the Oklahoma Court of Criminal Appeals. As urged on rehearing in petitioner's case of the approximately forty-seven people receiving death sentences in the State of Oklahoma, no one had received the death sentence based solely on the finding of this aggravating circumstance. Further, approximately 90% of the people who received the death penalty had either the aggravating circumstance cruel, heinous and atrocious or probability of future acts of violence which would constitute a continuing threat to society. (Appendix One of Petitioner's brief on his petition for rehearing). Obviously, this rubber stamping of aggravating circumstances minimizes this Court's opinion in Godfrey v. Georgia preventing standardless sentencing discretion of juries to be approved by

appellate courts as was done in this instant case. This Court should grant certiorari to determine the proper scope of appellate review of aggravating circumstances and in generally, the verdict of death.

V.

THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE THE CONSTITUTIONALITY OF THE OKLAHOMA DEATH PENALTY STATUTE AS INTERPRETED BY THE OKLAHOMA COURT OF CRIMINAL APPEALS.

The Oklahoma Court of Criminal Appeals, in interpreting the meaning of the Oklahoma Death Penalty statute, in Irvin v. State, 617 P.2d 588 (Okla. Cr. 1980), held:

"The only discretion provided the jury under the statute is that necessary to make a factual finding of the existence or non-existence of aggravating and mitigating circumstances, as well as the discretion requisite in balancing the two."

In the instant case, petitioner's jury was authorized three courses of action. The first of these is that the jury was not authorized to consider the penalty of death unless one or more aggravating circumstances existed beyond a reasonable doubt. The second possible authorization is if one or more of the aggravating circumstances existed beyond a reasonable doubt and the jury was authorized to consider imposing a death sentence. The final choice the jury had was if they found the aggravating circumstances were outweighed by one or more mitigating circumstances, then the death penalty shall not be imposed and the sentence shall be light.

The jury was not told what would happen if the aggravating circumstances were not outweighed by mitigating circumstances but logically one would infer the death penalty must be imposed in such a situation based on the court's instruction.

In holding this statute mandatory unless mitigating circumstances outweigh aggravating circumstances as the Court

of Criminal Appeals did in Irvin, requires the defendant to come forward with evidence in mitigation where death is mandatory. This clearly shifts the burden of proof to the defendant to prove he should live. This burden shifting in a capital case where the reliability of the sentencer's decision is critical. Gardner v. Florida, 430 U.S. 349. violates the Eighth and Fourteenth Amendments to the United States Constitution.

This Court in Gregg, *supra*, and Proffitt, *supra*, approved similar statutory schemes of the states of Georgia and Florida. However in the plurality opinion of Justices Stewart, Powell and Stevens in Gregg and Proffitt, neither state supreme court had interpreted the statute to be mandatory once mitigating circumstances did not outweigh aggravating. Georgia, pursuant to statutory scheme, allows the jury to recommend mercy which was recognized by the plurality opinion in Gregg at 428 U.S. 197 and as in this statutory makeup of the Georgia capital statute, §26-3102 *supp.* 1975. Further in Proffitt, this Court pointed out that aggravating and mitigating circumstances are used to assist the sentencer in making his determination. 428 U.S. at 253 (Emphasis Added). Oklahoma has eliminated the element of mercy in its mandatory interpretation of its statute and has papered over the unbridled discretion of juries by such interpretation.

CONCLUSION

For the reasons stated above, the petitioner requests a writ of certiorari be granted.

Respectfully submitted,

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